August 29, 2011

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Comments of Kyle Magrill in FCC 11-105
MM Docket No. 99-25 (LPFM Proceeding)

Dear Ms. Dortch:

CircuitWerkes, Inc. has commercial FM translator applications pending in the Auction No. 83 FM translator filing window. I am a principal in CircuitWerkes, Inc. These comments are intended to address the "third Further Notice of Proposed Rulemaking" (FCC 11-105). I also further clarify and append to comments filed jointly with Joe DiPietro on November 05, 2010 in light of the "Local Community Radio Act of 2010 (LCRA), passed by Congress earlier this year.

BACKGROUND:

On January 4th, 2011, President Obama signed the Local Community Radio Act (LCRA) into law. One of the things that the new law requires the FCC to do is assure availability of spectrum for both LPFM and translator use. The law does not require that spectrum be taken from one service and handed over to another service.

Numerous comments have stated or suggested that the only way to assure spectrum for LPFM is to dismiss some, or all of the existing translator applications that are still pending from Auction 83, nearly 8 years ago. In the most recent third Further Notice of Proposed Rulemaking, the Commission is considering precisely this approach.

While the focus of most comments has been how to best deal with the remaining auction 83 translator applications, very few recent comments have discussed any other ideas for improving the LPFM service in light of the LCRA. These comments are intended to put forward ideas that could be implemented under the new law regarding auction 83 applications as well as other suggestions for improving the LPFM service.

DISCUSSION:

In FCC 11-105, the Commission considers dismissing the majority of translator application in most medium to large markets. Many of the comments received from LPFM supporters suggest dismissal of all pending auction 83 translator applications while still others favor dismissing applications that are "clearly speculative" in nature, but would retain applications that are judged non-speculative.

I believe that wholesale dismissal of pending applications is imprudent and unnecessary. Further, such actions would probably delay, for years, the very services that they seek to benefit due to potential litigation resulting from the FCC changing translator processing policies in mid-stream.

The arguments for dismissal or caps all assume that very few or no LPFM channels will be available in most larger markets if the existing translator applications are permitted to remain. In an effort to determine if this was true, the FCC staff performed an extensive, yet limited, evaluation of the top 150 markets and applied a formula that required at least as many LPFM stations (on average) as there are non-commercial stations. The rational as to why the number of full service non-commercial stations should guide the FCC in planning how many channels should be available for LPFM applicants could, and probably should, be debated as potentially arbitrary.

The staff's analysis, suffered from several serious limitations that potentially affect the results in a very significant way that is potentially unfair to translator applicants. Most noteworthy is the fact that the study employed only spacing criteria embodied in the current rules with the exception that 3rd channel adjacency restrictions that were eliminated in the LCRA. The staff's study did not account for the use of D/U ratios to allow LPFM stations to use 2nd adjacencies which is permitted under the LCRA. The use of contour methods for using channels with regards to LPFM vs translators was also not considered even though the LCRA now only requires spacing protections between LPFM stations and full service FM stations.

It should be noted that the use of D/U ratios for siting LPFM stations on 2nd adjacencies of full service FM stations is routinely allowed on a case-by-case basis and was policy before the LCRA was passed. The LCRA furthers this process by requiring the Commission to establish the specifications by which any LPFM station can use D/U ratios, though the method of implementation has been left to the Commission. D/U ratio analysis is already routinely used, without a waiver, by translator stations up to 250Watts that wish to exist within the service contours of full-powered stations. The D/U ratio method currently used by translators has, generally, produced good results and could be used to allow more LPFM stations to be placed on 2nd adjacencies in many markets

As a result of the above mentioned limitations in the staff's study, particularly not including D/U ratios in the study, it may grossly *underestimate* the number of available LPFM slots in a given market and gives an unfair representation that will cause translator applications to be unnecessarily dismissed. This view is contrary to the Commission's statement in paragraph 10 of the FNPRM that the reporting of potential LPFM channels may be grossly *overstated*. Although the Commission believes that the translator settlement process may result in fewer LPFM channels, it is also quite possible that it will result in more as a result of non-commercial applications being displaced by commercial ones. Before dismissing any applications, the FCC staff should be instructed to re-run the market by market study, adding the same D/U analysis as is currently employed by translators. This will produce results that are far closer to the potential reality than the first attempt to analyze the situation. Because analyzing all of the top markets is a pretty big job, it is a job best suited to the resources of the FCC. The existing study, while a good start, should not be solely relied upon to determine which markets have no space for LPFM stations.

Additionally, no consideration was given to the LP-10 class of station. The LP-10 class of station is discussed in more detail later.

In those markets where the minimum number of stations could not be achieved, the Commission proposes to dismiss all auction 83 applications. It appears that dismissal would apply to all translator applications in a market, even if they are very far removed from the "core" city and intended to serve rural populations. It should be noted that there are many large and medium markets that extend for dozens of miles beyond the central city. Since the FCC's study was limited to "core" market locations, an allowance must be made for further studies, either Commission conducted, or independently conducted, that demonstrate potential LPFM service to large populations outside of the "core" but still within the markets.

THE CASE FOR LP-10 STATIONS:

Many years ago, the FCC allowed low powered radio stations which were called Class D stations. Many of these stations were 10 Watt facilities. These were once described as "little Islands of service that cause seas of interference". It has been suggested that LP-10 stations may not ever be authorized out of concern that they serve too few people to justify their potential for interference.

Attached as Appendix A is a sample study of the top 5 markets. The study shows some LP-100 channels and quite a few LP-10 channels as they potentially could be used. This investigation found that LP-10 stations in these markets can reach extraordinary numbers of people. In some cases, populations served exceed 500,000 and we found many examples where population coverage well exceeded 100,000. We believe that LP-10s is the preferred type of facility, especially in larger markets. This is not only because they can be placed where LP-100 stations cannot, but also because many LP-

10 stations can often be fit on a single channel within a market, thus allowing many more voices on the air in places where the available spectrum is rare. It is also noteworthy that many translator applications in larger cities specify low powers, in some cases as low as a single Watt in order to exist within the tight spectrum. Since translators of 10W or less are routinely granted, potential LPFM applicants should be afforded the same opportunity. The ability to use low power is, therefore potentially beneficial for both translators and LPFMs. Further, in cases where channels were found that supported either LP-10 or LP-100 stations, the LP-10 stations had two potential advantages:

1. They could often be located closer to the population clusters, thereby serving more people than the LP-100 stations.
2. In many cases, several LP-10 stations can be assigned to the same channel in the same market, whereas only one LP-100 station may preclude placement of any additional LP-100 stations in a town. Use of LP-10 stations would dramatically increase the number of broadcast voices on the air in many communities.

In each market that we analyzed, only proposals with service contours exceeding 10,000 people were used. In every case, except New York, one or more channels were found that placed a service contour over some part of the incorporated city for which the market was named. No attempt was made to make an exhaustive inventory of available channels in each market. It is also entirely possible that there will be some cities where no new facilities can be built, however, this study does demonstrate that, in a lot of cities, more available LPFM channels can be found than was revealed in the FCC study. We did not have the time or resources to pinpoint every available channel, but we hoped to present a representative analysis that proves the fact that channels are available in many markets. Based on our analysis, we can state that, not only are channels available, but many of them are quite potent in terms of the number of people served. Coverage maps, with population counts, of representative proposed facilities are presented as “Appendix A” at the end of these comments. Because of the benefits exhibited by LP-10 stations, I believe that the Commission should authorize these stations and that the next available window should be for LP-10 applications. LP-100 applications could be accepted subsequent to the LP-10 window. LP-10 stations that meet LP-100 criteria could file for upgrades during the LP-100 window and subsequent to it.

METHODOLOGY TO ESTABLISH AVAILABILITY OF LPFM CHANNELS USING ADDITIONAL CRITERIA:

In order to assess the availability of LPFM channels, we had to make several assumptions. These included:

1. Siting on 2nd adjacencies will be routinely permitted to facilities that meet the –40dBu desired-to-undesired signal ratio currently used by translators to establish no interference for 2nd channel adjacency stations.
2. The FCC will authorize 10 Watt LPFM stations (LP-10) prior to the opening of a new LPFM window.
3. Intermediate Frequency (IF) spacing protection rings will be eliminated for LPFM stations since they do not exist for translators operating at 100 Watts or less.
4. Third channel adjacency protections are eliminated as required by the LCRA.
5. The specific community of license is not relevant. There is no requirement for an LPFM to put any service contour over any portion of its community of license so we concerned our study with finding large population groups to serve within each of the top markets. In some cases, LPFM stations were located within, or adjacent to the cities that the markets were named for, but in some cases, we found huge populations that could be served by LPFM stations not directly in the specific city bearing the name of the market. We judged those populations as being just as deserving of new service as those living in the specific city.

We did not assume any sort of contour methodology to translators or translator applications, although such methods are no longer barred by law. We believe that the FCC should allow contour methods to be used by LPFMs with regard to translators since this method is already being used by translators with regard to LPFMs. The result is that translators can move closer to LPFMs than LPFMs can to translators. This creates an asymmetrical set of rules that favors translators over LPFMs, This situation is easily resolved under the current law and should be eliminated.

Further, there is no limitation on contour methods being used between LPFM stations and allowing contour methods to be used for siting LPFM stations in proximity to each other potentially increases the number of LPFM stations that can be placed in an area.

Rather than go to a straight contour methodology, it may be best to adopt a hybrid approach where continued use of spacing rings constitutes a simple test, but where supplemental contour showings are allowed when the spacing criteria are not met.

PROTECTING UNPOPULAR TRANSLATOR APPLICATIONS

While there is certainly demand for LPFM service, such demand should not be used to trample the rights of others. LPFM proponents forget that LPFM applicants were given the first filing window in 2000. During that window, thousands of LPFM applications were received and many were processed. In many markets, LPFM frequencies remained available, but there were no applicants. The translator filing window in 2003 occurred only after the first LPFM windows were closed. Now, the FCC has proposed dismissing all translator applications in markets where the staff can't easily find LPFM channels.

If that will be the approach, then the FCC must also guarantee that, statistically, the number of available translator channels in each market after the LPFM window will be in approximate parity to the number of LPFM channels used. Only then would such an arrangement be fair to both classes.

We should also remember that a filing window for LPFMs was opened immediately ***before*** the filing window for translators was opened. The original LPFM filing window resulted in thousands of applications and grants to nearly 1000 new LPFM stations. Only after the LPFM window had closed was the Auction 83 window for new translators opened. Would-be translator applicants quietly waited as channels from coast to coast were awarded to new LPFM licensees. There were no complaints that the thousands of LPFM applications were unfairly hogging up the available spectrum. Auction 83 applicants then had to protect the existing LPFM applications. A primary difference between the LPFM applications from the first window and the auction 83 applications is that about half of the auction83 applications are still pending while most of the LPFM applications were resolved. Now, the Commission proposes to alter the window process, in this case, as a means to dismiss the large volume of existing translator applications. I point out that the demand for new translator service does not lessen the value of the service. In other words, just because there are a lot of applications does not mean that those applications lack merit. If Congress had intended to change the FCC's existing filing window process, they could have specifically told the FCC to change the processing queue from first-come-first served filing windows to some sort of combined window. The absence of this directive leaves the FCC free to follow its normal processing rules. In fact, the law specifically directs the FCC to continue processing existing translator apps. This tells us that Congress is aware of the backlog of existing applications and specifically chose not to interfere in the processing of those filings. The Commission states that Congress clearly intended for the Commission to change it's processing priorities in light of the new law. It could equally be argued that the lack of a Congressional directive to do so can be construed as a clear indication that Congress intends that the FCC should ***not*** change its current processing methods to favor new LPFM applications over existing translator applications.

SPECULATION AND TRAFFICKING

It is well known that the FCC, generally, frowns on so-called speculative applications because speculation potentially results in licenses that are unneeded. Potentially, this squanders a public resource and causes unnecessary work for the FCC staff since there is no way to be sure that anyone associated with the community to be served is actually interested in the facility. By claiming that most translator applications are speculative, various comments have attempted to brand most translator applicants with an invisible "scarlet letter". Once a population is branded as inferior, it is easy to justify wiping them out, as history has, so often, shown with tragic results.

The vast majority of the applications were filed by non-commercial entities that paid no filing fees. In many cases, multiple applications were filed for the same markets, by the same applicants. It is probable that they never expected to use more than one or two of these channels in any given market. Does the fact that more applications were filed than would likely be needed mean that the applicants were speculating? The answer depends on how "speculation" is defined in this context. The applicants had no way of knowing which channels would have mutually exclusive applications filed. Further, as non-commercial entities, they cannot go to auction, so any channel that has a mutually exclusive commercial application is lost to them unless, during the settlement process, they can work out an engineering solution, which may not be possible. They had to anticipate that many of their applications would ultimately be dismissed, so they employed a strategy designed to have the best chance of obtaining some permits in the face of anticipated losses. This strategy was bound to produce occasional duplication of service since there is a chance that multiple applications will be granted in some locations where there is no other expression of interest in a channel or channels. Does that make the applications speculative? If speculation is defined as applying for channels without the intent to serve a market, then the answer is no. The applicants apparently were interested in servicing particular markets but ended up with some duplicated coverage that they sold or donated to other organizations.

While it is true that some of the largest application filers have sold many of their construction permits, most applicants built their translators. Those few applicants that sold significant holdings, primarily used the funding received to build hundreds more. Since most applicants do not appear to have applied for facilities with the expressed intention of simply selling them as real estate, this would not seem to be purely speculative. It is also doubtful that the granting of these facilities wasted either the public spectrum or the FCC's resources because the facilities that were sold have generally been put on the air and are serving their markets, thus satisfying the public's convenience, interest and necessity.

Several comments have mis-characterized most of the non-commercial applications as so-called "satellators". Even if they were, there is still a public benefit derived from building regional or national networks of non-commercial facilities which is why satellators are permitted in the reserved band. Additionally, the comments are simply wrong. Most of the translator applications, except some in the reserved band, are intended to rebroadcast radio stations by direct off-air reception of stations in adjacent communities and are not satellators at all.

SPECIFIC PROPOSALS:

Before dismissing any translator applications, direct the staff to run a new analysis of the top 150 markets adding 2nd adjacency D/U analysis to determine how many LPFM stations potentially fit. Potentially, use the LP-10 class in the top 100 markets.

Remove 2nd adjacency restrictions between LPFM and translators and between all facilities operating at 250W or less.

Remove IF protection requirements for all stations operating at less than 101 Watts.

Open a filing window for LP-10 stations, particularly in the top 50 markets. Subsequently, allow LPFM stations to upgrade to LP-100 or downgrade to LP-10 as desired.

Allow contour methods between LPFM and Translators

LPFM stations are currently limited to moves of 5.6km which is the distance to the class contour. All other services are required to have some portion of the existing service contour touch or overlap some portion of the new service contour. The maximum permissible move is therefore, 2x the distance to the class contour. For some reason which is unexplained, LPFM stations can move only half as far as all other classes of station. The rule should be amended so that an LP100 can move a maximum of 11.2 km and an LP10 can move a maximum of 6km.

Allow existing LPFM stations to change channels to any open frequency as a minor modification.

Operators of existing LPFM time-shared channels should be allowed to apply for individual channels that are newly opened in their communities as a result of the new law, as either LP-100 or LP-10.

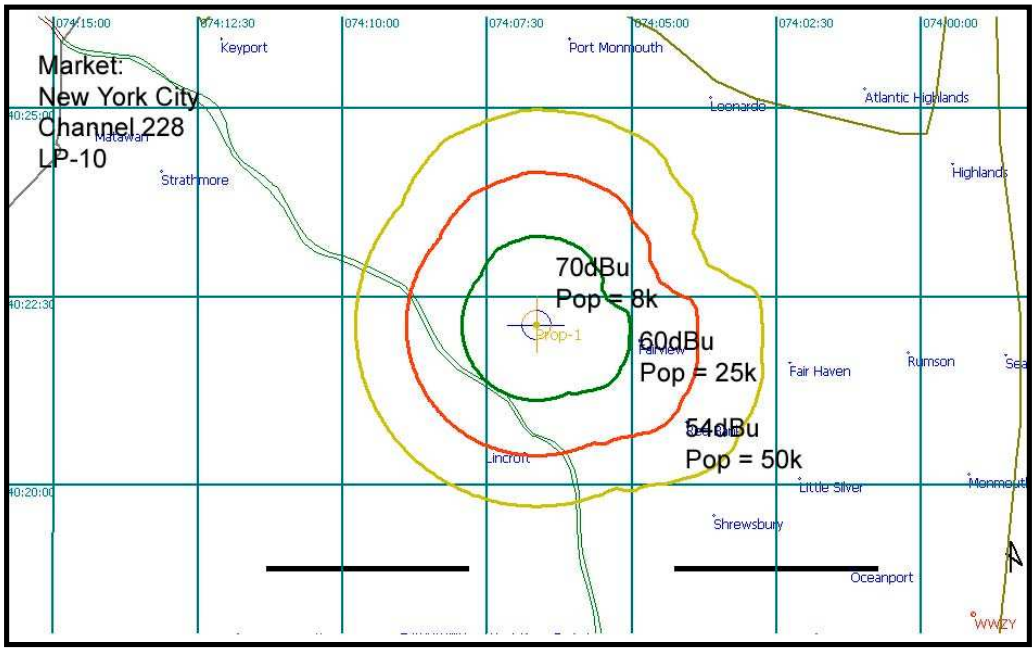
Allow intermediate power levels for LP-100 stations for contour methods with respect to translators and other LPFMs.

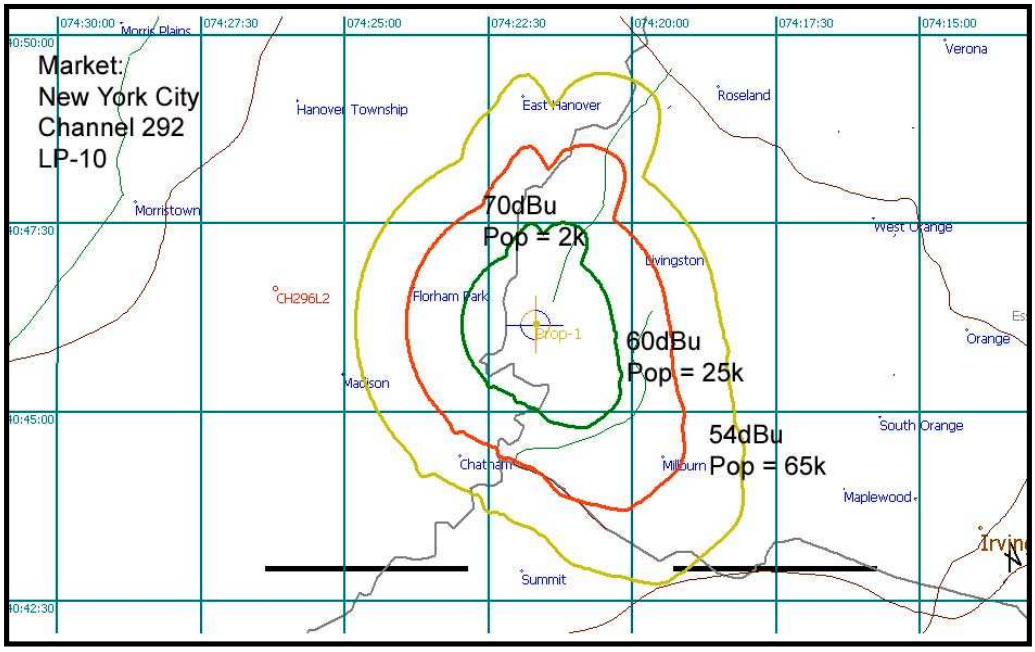
Respectfully submitted,

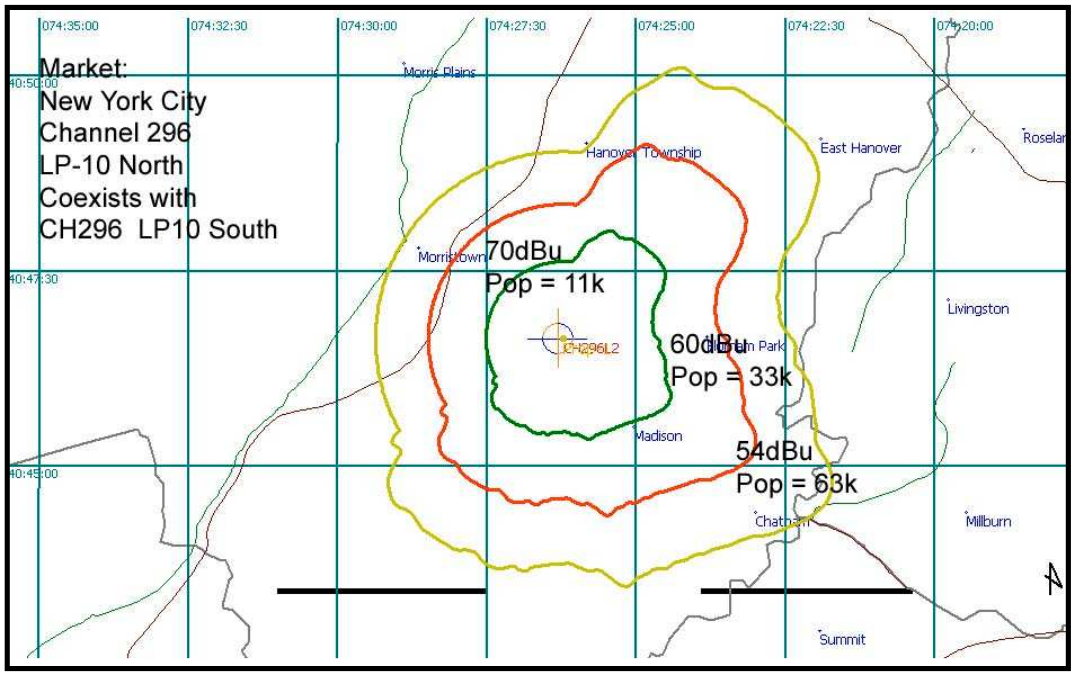
Kyle Magrill
CircuitWerkes, Inc.

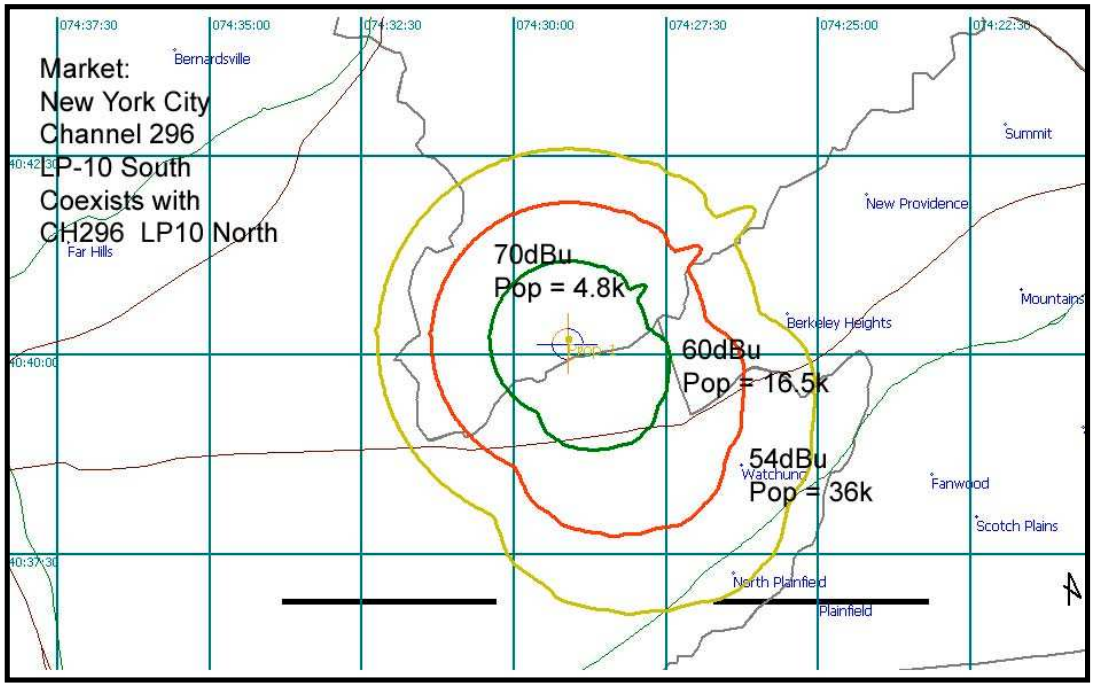
APPENDIX A

New York

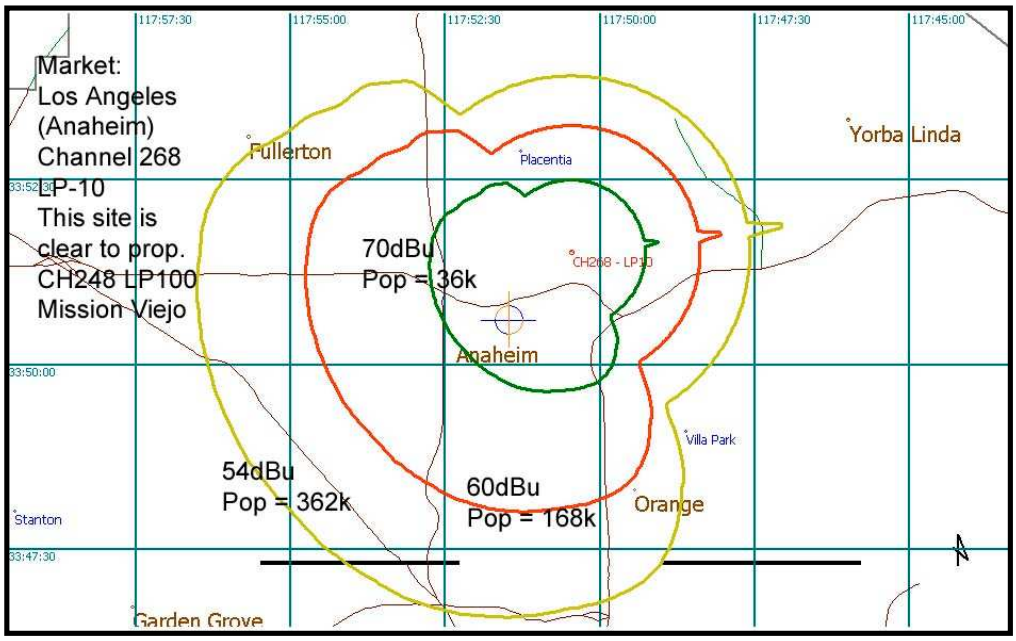


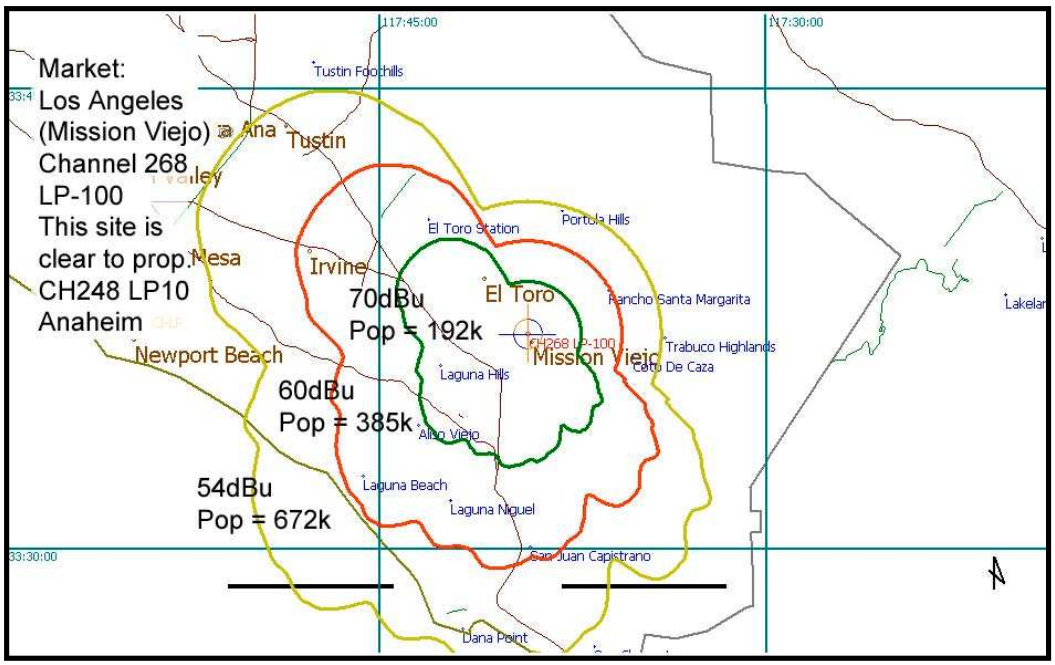


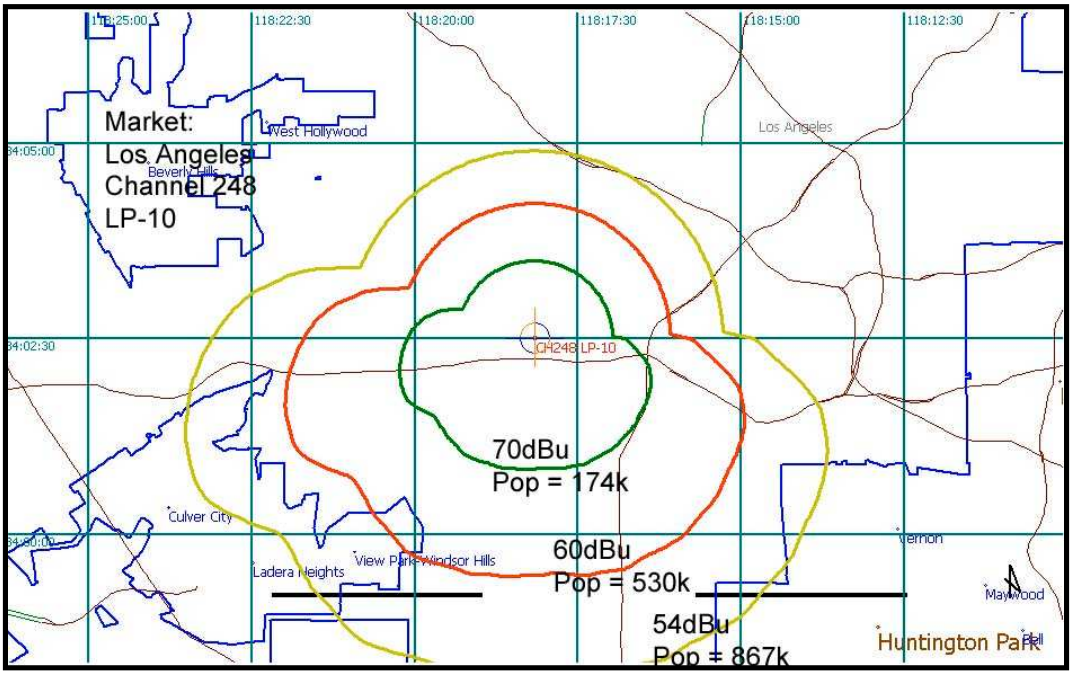

Market:
New York City
Channel 296
LP-10 North
Coexists with
CH296 LP10 South
70dBu
Pop = 11k
60dBu
Pop = 33k
54dBu
Pop = 63k
Morris Plains
Hanover Township
East Hanover
Morristown
Livingston
Madison
Chatham
Millburn
Summit
074:35:00
074:32:30
074:30:00
074:27:30
074:25:00
074:22:30
074:20:00
40:50:00
40:47:30
40:45:00

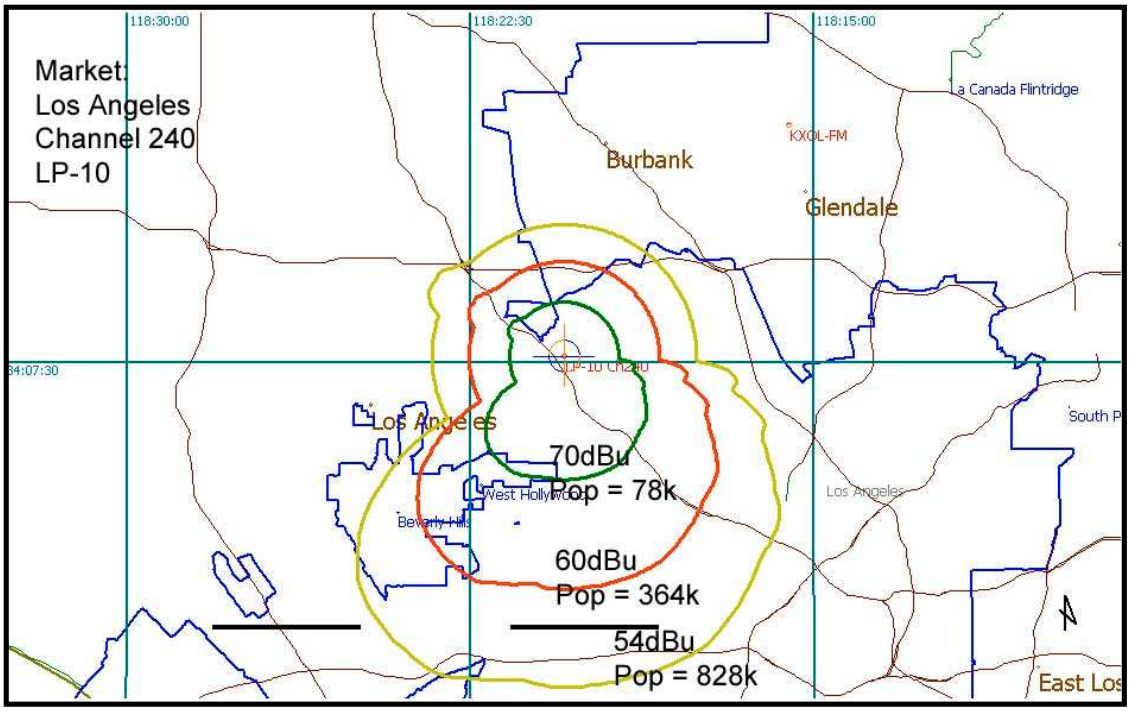

Market:
New York City
Channel 296
LP-10 South
Coexists with
CH296 LP10 North
70dBu
Pop = 4.8k
60dBu
Pop = 16.5k
54dBu
Pop = 36k
Bernardsville
Far Hills
Summit
New Providence
Berkeley Heights
Mountains
Watchung
Fanwood
Scotch Plains
North Plainfield
Plainfield
074:37:30
074:35:00
074:32:30
074:30:00
074:27:30
074:25:00
074:22:30
40:42:30
40:40:00
40:37:30

Los Angeles

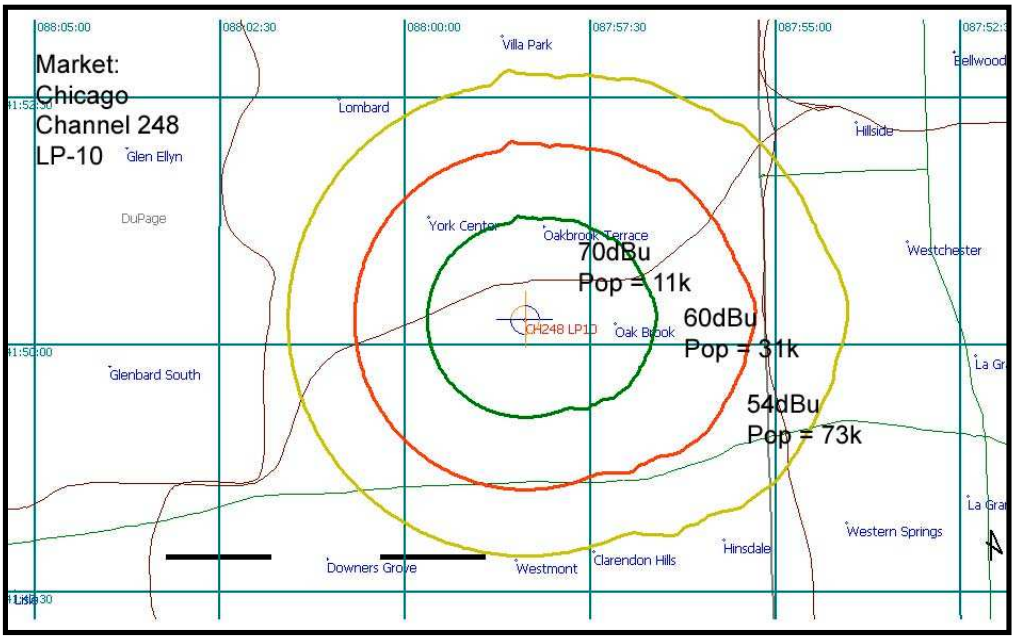

Market:
Los Angeles
(Anaheim)
Channel 268
LP-10
This site is
clear to prop.
CH248 LP100
Mission Viejo
70dBu
Pop = 36k
54dBu
Pop = 362k
60dBu
Pop = 168k
Fullerton
Placentia
Yorba Linda
Anaheim
Villa Park
Orange
Stanton
Garden Grove
117:57:30
117:55:00
117:52:30
117:50:00
117:47:30
117:45:00
33:50:00
33:47:30

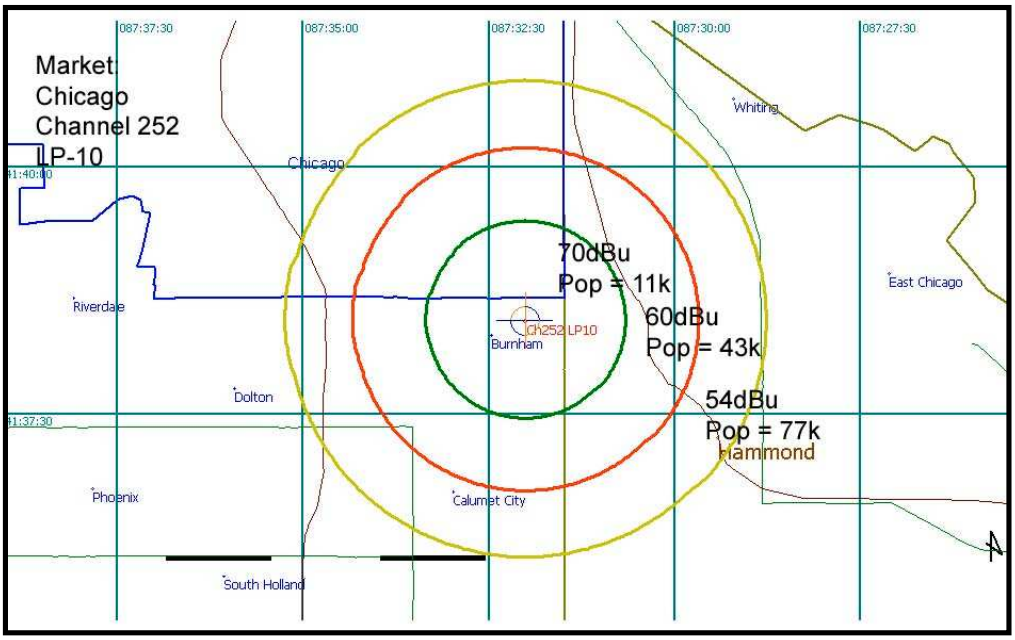

Market:
Los Angeles
(Mission Viejo)
Channel 268
LP-100
This site is
clear to prop.
CH248 LP10
Anaheim
70dBu
Pop = 192k
60dBu
Pop = 385k
54dBu
Pop = 672k
Tustin Foothills
Tustin
El Toro Station
Portola Hills
Irvine
El Toro
Rancho Santa Margarita
Mission Viejo
Trabuco Highlands
Newport Beach
Laguna Hills
Aliso Viejo
Laguna Beach
Laguna Niguel
San Juan Capistrano
Dana Point
117:45:00
33:30:00

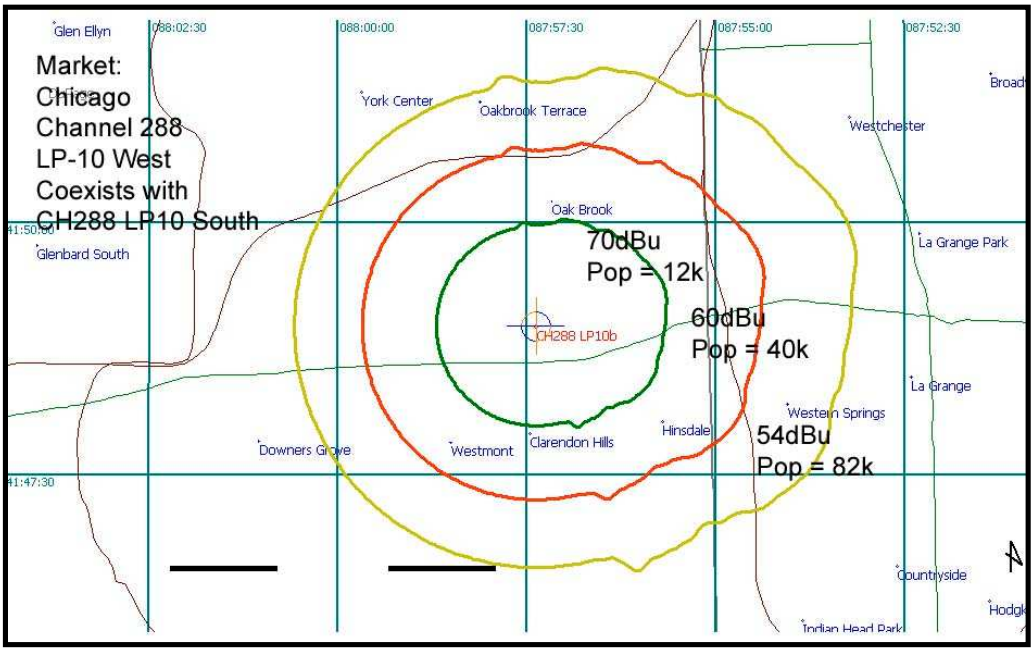

Market:
Los Angeles
Channel 248
LP-10
West Hollywood
Los Angeles
Beverly Hills
CH248 LP-10
70dBu
Pop = 174k
Culver City
Ladera Heights
View Park-Windsor Hills
60dBu
Pop = 530k
Vernon
Maywood
54dBu
Pop = 867k
Huntington Park

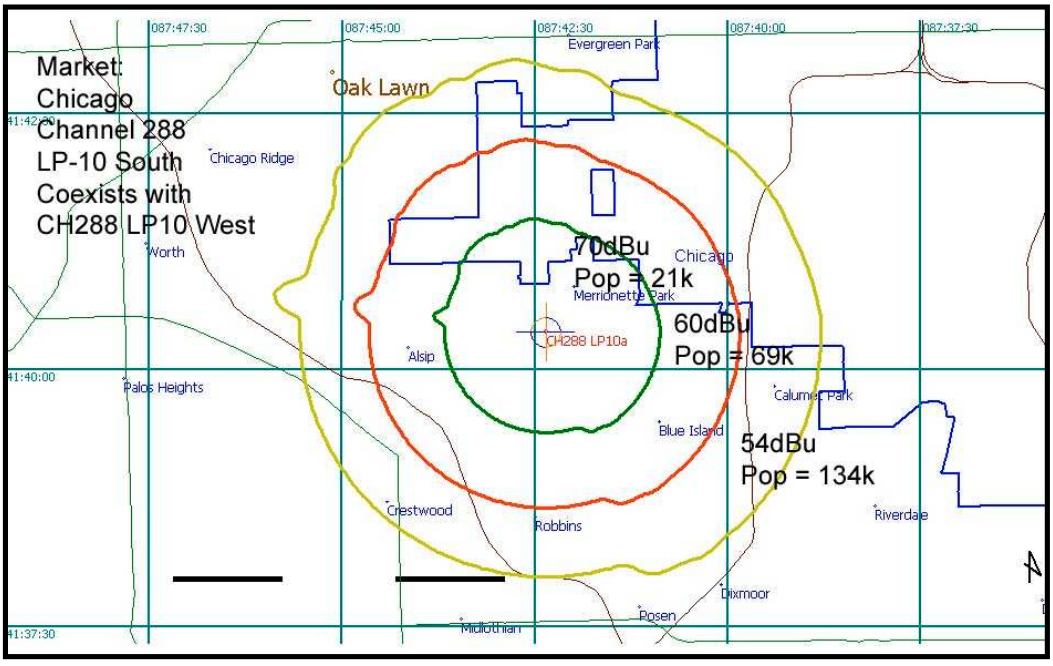

Market:
Los Angeles
Channel 240
LP-10
Burbank
KXOL-FM
Glendale
Los Angeles
70dBu
Pop = 78k
West Hollywood
Beverly Hills
60dBu
Pop = 364k
54dBu
Pop = 828k

Chicago

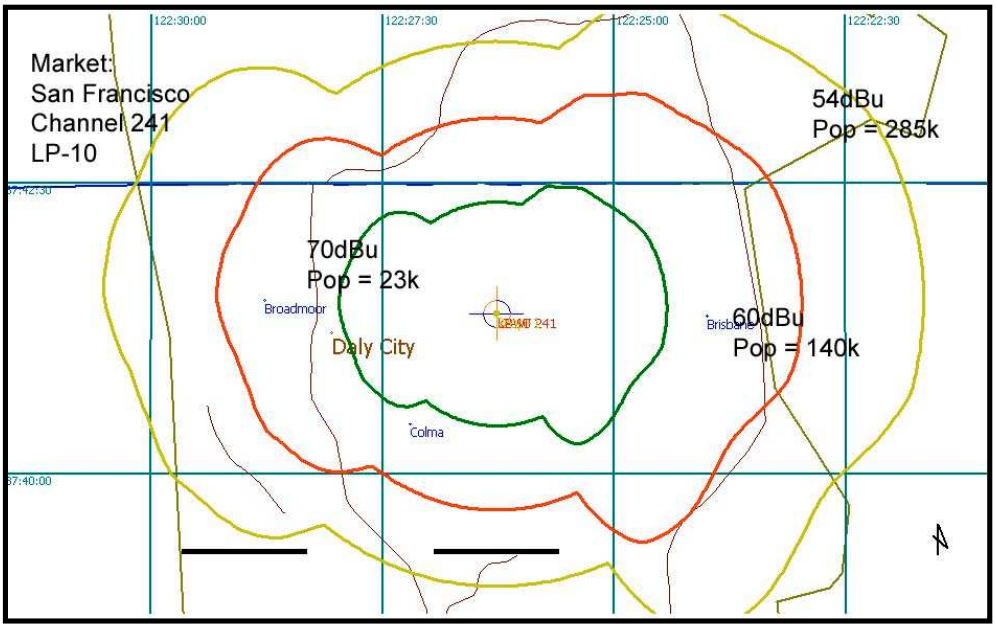

Market:
Chicago
Channel 248
LP-10
70dBu
Pop = 11k
60dBu
Pop = 31k
54dBu
Pop = 73k
CH248 LP10
Villa Park
Lombard
Glen Ellyn
DuPage
York Center
Oakbrook Terrace
Oak Brook
Hillside
Bellwood
Westchester
Glenbard South
Western Springs
Hinsdale
Clarendon Hills
Westmont
Downers Grove

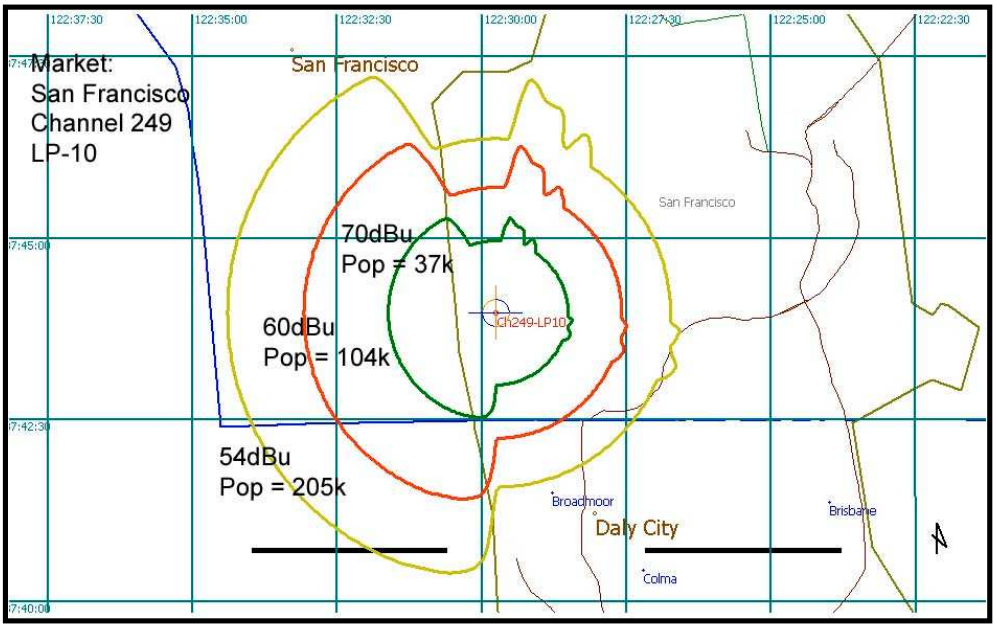

Market:
Chicago
Channel 252
LP-10
70dBu
Pop = 11k
60dBu
Pop = 43k
54dBu
Pop = 77k
CH252 LP10
Chicago
Whiting
East Chicago
Riverdale
Burnham
Dolton
Hammond
Phoenix
Calumet City
South Holland

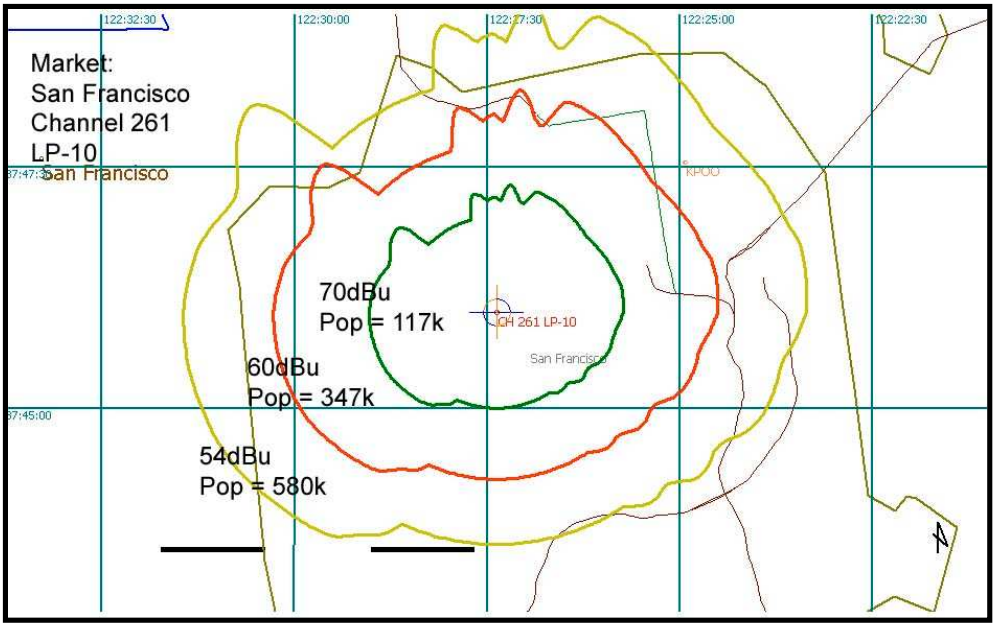

Market:
Chicago
Channel 288
LP-10 West
Coexists with
CH288 LP10 South
70dBu
Pop = 12k
60dBu
Pop = 40k
54dBu
Pop = 82k
CH288 LP10b
Glen Ellyn
York Center
Oakbrook Terrace
Westchester
Oak Brook
Glenbard South
La Grange Park
La Grange
Western Springs
Hinsdale
Clarendon Hills
Westmont
Downers Grove
Countryside
088:02:30
088:00:00
087:57:30
087:55:00
087:52:30
41:50:00
41:47:30

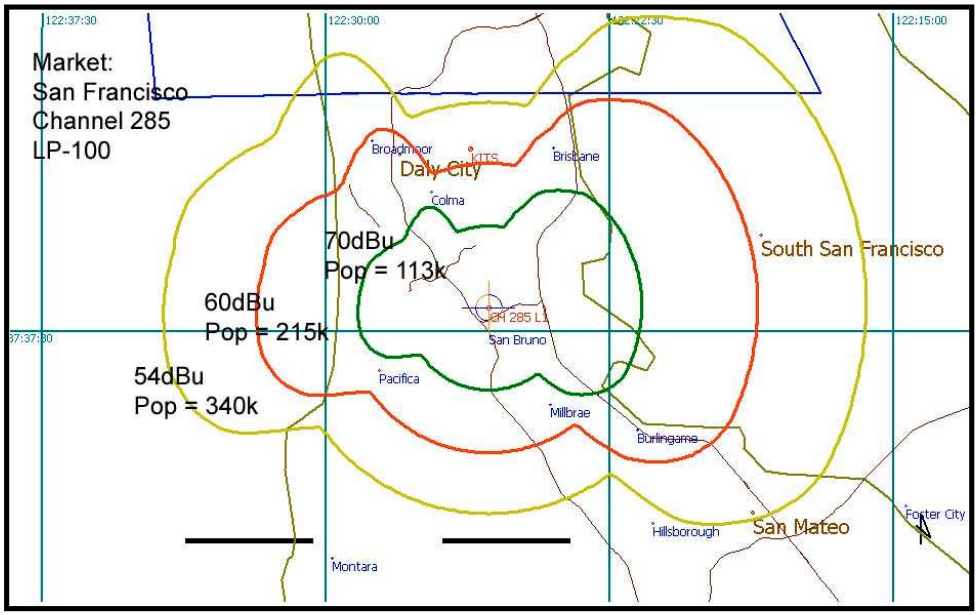

Market:
Chicago
Channel 288
LP-10 South
Coexists with
CH288 LP10 West
70dBu
Pop = 21k
60dBu
Pop = 69k
54dBu
Pop = 134k
CH288 LP10a
Oak Lawn
Evergreen Park
Chicago Ridge
Worth
Chicago
Merrionette Park
Alsip
Palos Heights
Calumet Park
Blue Island
Crestwood
Robbins
Riverdale
Dixmoor
Posen
Midlothian
087:47:30
087:45:00
087:42:30
087:40:00
087:37:30
41:42:30
41:40:00
41:37:30

San Francisco






Market:
San Francisco
Channel 261
LP-10
San Francisco
70dBu
Pop = 117k
60dBu
Pop = 347k
54dBu
Pop = 580k
CH 261 LP-10
San Francisco
KPOO
122:32:30
122:30:00
122:27:30
122:25:00
122:22:30
37:45:00


Market:
San Francisco
Channel 285
LP-100
70dBu
Pop = 113k
60dBu
Pop = 215k
54dBu
Pop = 340k
CH 285 L1
Broadmoor
Daly City
KITS
Brisbane
Colma
South San Francisco
San Bruno
Pacifica
Millbrae
Burlingame
Hillsborough
San Mateo
Foster City
Montara
122:37:30
122:30:00
122:15:00
37:37:30

Dallas-Ft Worth (Examples of LP-100 Coverage) LP-10 will also fit.